SUPREME COURT, U. S.
FEB 12 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1974

No. 74-1009

CLEAR GRAVEL ENTERPRISES, INC.,
Petitioner,

vs.

NOLAN KIEL, STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, STATE OF NEVADA, and ROLLA CHANDLER, CHIEF DIVISION OF LAND MANAGEMENT, RENO, NEVADA, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN W. BONNER
COUNSEL for Petitioner
FIRST NATIONAL BANK BLDG.,
Suite 416
302 E. Carson Ave.,
Las Vegas, Nevada 89101

TED A. EMBRY
OF COUNSEL
704 So. 6th Street
Las Vegas, Nevada 89101

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1974

No. _____

CLEAR GRAVEL ENTERPRISES, INC.,
Petitioner,

vs.

NOLAN KIEL, STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, STATE OF NEVADA, and ROLLA CHANDLER, CHIEF DIVISION OF LAND MANAGEMENT, RENO, NEVADA, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN W. BONNER
COUNSEL for Petitioner
FIRST NATIONAL BANK BLDG.,
Suite 416
302 E. Carson Ave.,
Las Vegas, Nevada 89101

TED A. EMBRY
OF COUNSEL
704 So. 6th Street
Las Vegas, Nevada 89101

TABLE OF CONTENTS

	Page
THE OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	11
APPENDICES:	
A. Order denying (Rehearing)	1a-2a
B. Opinion of Ninth Circuit	1b-6b
C. Judgment of District Court	1c-4c
D. Opinion of Board of Land Appeals Clear Gravel Enterprises, Inc.	1d-45d
E. Opinion of Hearings Examiner Clear Gravel Enterprises	1e-27e
F. Opinion in related case United States vs. Gibbs et al	1f-3f
AUTHORITIES CITED CASES:	
Hanover Shoe vs. United States Shoe Machine Corporation, 392 U.S. 481, 20 L.Ed. 2d 1231, 88 S. Ct. 224	8
Shepley vs. Cowan, 91 U.S. 340	9
STATUTES:	
Common Varieties Act 28 USC 611	3
GOVERNMENT ORDERS:	
Classification Order #95	3

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1974

No. _____

CLEAR GRAVEL ENTERPRISES, INC.,
Petitioner,

vs.

NOLAN KIEL, STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, STATE OF NEVADA, and ROLLA CHANDLER, CHIEF DIVISION OF LAND MANAGEMENT, RENO, NEVADA, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CLEAR GRAVEL ENTERPRISES, INC., Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 9th., 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported in the official reports. It affirmed a judgment of the District Court, District of Nevada (Las Vegas). Said opinion is appended hereto as appendix B at page 1b. The district Court judgment is appended hereto as appendices C, at page 1c. The opinion denying re-hearing is appended hereto as appendices A at page 1a. The opinion of the Board of Land Appeals, United States vs. Clear Gravel Enterprises, IBLA-70-15, decided May 20, 1971, is appended hereto as appendices D, at page 1d. The opinion in same case before Hearings Examiner, Nevada 957075, decided June 29, 1966, is appended hereto as appendices E, at page 1e. The related opinion of United States vs. Gibbs et al, IBLA 71-285, decided November 21, 1973, is appended hereto as appendices F, at page 1f.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on October 9th, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the decision in Gibbs, supra, decided November 21, 1973 is retroactive and supersedes the holding in United States vs. Clear Gravel Enterprises, decided May 20, 1971. The latter being the case upon which present proceedings are based.

STATUTES AND GOVERNMENTAL REGULATIONS INVOLVED

On or about October 2, 1953, the Government issued Classification Order No. 95, which was published in the Federal Register on October 8, 1953, 18.F.R. 6412.

The Government relies primarily on title 30, section 611, commonly known as "common varieties act," which provides inter alia:

"No deposit of common varieties of sand, gravel, pumice, pumicile, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereinafter located under such mining laws _____" enacted July 23, 1955.

Petitioner contends that said statue has no application to the subject claims since a discovery of marketable sand and gravel had been made before October 2, 1953 when the land was withdrawn for small tracts.

STATEMENT

The two subject placer sand and gravel claims Nos 12 and 13, situate about 9 miles southeast of Las Vegas, Nevada, in the west half of Section 16, Tp. 21 S. R 60 East MDM along with 7 other claims all of which were association claims of 160 acres each, were located in the year 1946 by present major stockholders of petitioner or by children of the original locaters now decreased. The area is in the vicinity of many of the major sand and gravel operations of Las Vegas. The owners did their assessment work each year until 1962 when seven of said claims were patented. At the request of the Government, claims 12 and 13 were withdrawn from the patent application. This was done primarily for the reason that 12 and 13 did not actually border upon the other seven claims. Edgar A. Hollingsworth one of the

Government engineers recommending the withdrawal subsequently re-examined said claims and changed his opinion as to the validity and recommended the two claims for patent, See Page 2 appendices E. His report is in the administrative record in the Court below as G Ex-15.

Prior to October 2, 1953, petitioner had leased all of said claims to Young & Smith, a large sand and gravel operation. This company dug a well on Clear Gravel No. 1 and constructed a concrete highway from Clear Gravel No. 1 to other highways connecting the claim with Las Vegas. Access roads were built to all the claims. Clear Gravel 12 and 13 were held as reserves. The land had been tested by an engineer and his report is in evidence. See appendices D, page 1d. The engineer's report in evidence disclosed large deposits of good quality sand and gravel.

Young & Smith had a lease on all of said claims dated April 30, 1953, for fifteen months which was extended to five years. Young & Smith discontinued work in 1956. See appendices E page 1e. The owners continued to do the assessment work and other improvements on all of the claims until 1962 when seven of the claims were patented. Petitioner has continued the assessment works on 12 and 13; additionally several leases have been executed for selling gravel and sand from said claims. A well has been constructed on Clear Gravel 12. These claims have always been held as reserve claims by Petitioner.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it failed to consider the effect of the case of United States vs. Gibbs et al, appendices F, page 1f. on the opinion of

Clear Gravel Enterprises vs. United States, appendices D. Page 1d. which is the decision considered by the District Court and the Ninth Circuit. The case was cited at the time the Hearings Examiner had decided it when the instant case was heard by the District Court and when the Ninth Circuit decided the case the Board of Land Appeals which is the highest Judicial tribunal in the BLM, having succeeded to the Secretary in handling appeals had affirmed (see appendices E) and the case was argued in the oral argument in the Ninth Circuit. It was not mentioned in either District Court or Ninth Circuit, judgment and opinion.

This Court in the case of Hanover Shoe vs. United States Shoe Machine Corporation (1968) 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 224, held that the damages entered against the United States Machine Corporation would be given retroactive or retrospective effect.

In Shepley vs. Cowan, (1875) 91 U.S. 340, this Court held that the officers of the land department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the Public lands with a view to secure rights of preemption.

The Court went on to say that only a court of law could upset their decisions.

The law of Shepley, supra has never been changed and it remains as cogent authority to and including the present time.

Therefore, when two different panels of members of United States Department of the Interior-Office of Hearings and Appeals-Interior Board of Land Appeals, comprising at least one member Martin Ritvo, who wrote the opinion in the Clear Gravel Case, appendices D, and joined the dissent in the subsequent case of Gibbs et al, supra, just

about 2-1/2 years later on sand and gravel claims having identical locations and all facts are identical should not the court below have considered which of the decisions was the law of the case they were called upon to decide?

Does not Shepley, supra teach us that those administrative tribunals must be given the same kind of consideration which is given to other legal tribunals in deciding important matters?

Does Gibbs, supra require the decision to be treated retroactively?

We respectfully contend that this question raises a point as follows:

Has not the Ninth Circuit decided an important question of Federal law, that is, the question of reserves, in a way which has not been but should be, settled by this Court?

The BLM, administrative tribunals through the years have decided on property matters involving billions of dollars.

In the State of Nevada where approximately 87% of the land is public domain, it is particularly important that this question should be resolved by this Court.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

TED A. EMBRY
of counsel for
petitioner
704 So. 6th Street
Las Vegas, Nevada
89101

JOHN W. BONNER
Attorney for Petitioner
302 E. Carson,
Suite 416
Las Vegas, Nevada
89101

John W. Bonner